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No. 76-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

E. L. BOTELER, DIRECTOR, MISSISSIPPI STATE HIGHWAY DEPARTMENT

v.

NATIONAL WILDLIFE FEDERATION AND MISSISSIPPI WILDLIFE FEDERATION; WILLIAM T. COLEMAN, SECRETARY OF TRANSPORTATION; NORBERT T. TIEMANN, FEDERAL HIGHWAY ADMINISTRATOR; AND EMERY L. SHAW, FEDERAL HIGHWAY ADMINISTRATION DIVISION ENGINEER

BRIEF FOR NON-FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTER-STATEMENT OF THE CASE

In May, 1975 the Federal Highway Administration and the Mississippi State Highway Department were ready to begin construction on a 5.7 mile section of Interstate Highway 10 in Jackson County, Mississippi which would bisect the last remaining habitat for the Mississippi Sandhill Crane, an endangered sub-species numbering less than 40 birds. (A. 4, 13-14).[1] The U.S. Department of Interior, which administers the Endangered Species Act (16 U.S.C. § 1531 *et seq*), had in writing several times

[1] References are to the Appendices in Petitioner's brief. A. 1-33 is the opinion of the Court of Appeals, reported officially as *National Wildlife Federation, et al.* v. *Coleman, et al*, 529 F.2d 359.

protested that the highway construction would violate Section 7 of that statute requiring federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of such endangered species * * * or result in the destruction or modification of [critical] habitat of such species." (A. 12-14).[2]

On May 23, 1975, a few weeks after final Federal Highway Administration approval of highway construction plans, the National Wildlife Federation with its state affiliate, the Mississippi Wildlife Federation, brought suit (a) to enjoin the most damaging aspects of the construction—an interchange which threatened the crane's habitat with induced development, and "borrow" (excavation) pits which would drain the land—and (b) to compel public acquisition of crane-habitat land in order to mitigate the loss of habitat which would be taken, directly and indirectly, by the highway. (A. 14, 31; Pet. Br. 6).

On June 25, 1975, the day before trial on the merits of this case, the Department of Interior issue an *emergency determination* that 100,000 acres of land in Jackson County, Mississippi, including that portion of the County in which the highway would be built, was habitat critical to the survival of the Crane. (A. 14-15).

At trial the only substantive witness was the country's leading expert on the Mississippi Sandhill Crane, Jacob Valentine, a biologist with the U.S. Fish and Wildlife Service. (A. 25). He testified, for respondents, *inter alia* that—

- "every acre of habitat is vital to the cranes' existence, and that the construction of I-10 as planned will put the existence of the cranes in jeopardy";
- "the main effect of the highway so far as the crane is concerned is the stimulation of private development which will be induced by the construction of this segment of I-10";
- "the single most destructive aspect of the highway to the Crane and its habitat was the proposed interchange at Earl Bond Road, which would generate development in the cranes' habitat";
- "the most important things to be done to save the crane from extinction [in addition to the creation of a wildlife refuge] are the elimination of the interchange at the Earl Bond Road and of borrow pits from sensitive crane habitat."

(A. 25-26).

[2] See Pet. Brief p. 2 for Section 7 in its entirety.

The Final Environmental Impact Statement, produced by the Federal Highway Administration in conjunction with the Mississippi State Highway Department, was introduced into evidence. It contained these concessions:

- "The indirect effects of highway development, specifically the effects of residential and commercial development, are known, however. The crane cannot survive in built-up areas, and a certain amount of private development will always accompany construction of a major highway facility. This new development within the crane's habitat is the most significant effect that is to be feared."
- "At the present time, the greatest threats to the existence of the Mississippi Sandhill Crane are private development and the construction of Interstate Route No. 10."
- "It is felt that the primary effects of the highway [on the Crane] will not come from the physical existence of the facility but from the inherent development which accompanies a new highway."

(A. 9-11)

No testimony or other evidence was put forward by the federal or state defendants to controvert Mr. Valentine's

testimony or to explain away the admissions in the environmental impact statement.

Nonetheless, the District Court found that the plaintiffs had not satisfied their burden of proving a violation of the Endangered Species Act. (A. 43).[3] The Court found that the defendants "had adequately considered" the impacts on the crane (A. 46), and that the evidence of threat to the crane was too speculative to warrant a finding of violation of Section 7. (A. 43, 45).

The Fifth Circuit disagreed. On appeal it held that the Federal Highway Administration had a duty not just to "consider" the impacts of their actions on the crane, but to *insure* that those impacts did not jeopardize the existence of the crane or destroy or modify its critical habitat (A. 27). Accordingly, it reversed the District Court and remanded with instructions to issue an injunction against the building of the interchange and the digging of borrow pits in the area designated as critical habitat, until the Department of Interior was satisfied that necessary modifications in the highway project were made which would insure compliance with Section 7. (A. 32).

The State Highway Department filed its petition for a Writ of Certiorari with this Court on September 7, 1976.

ARGUMENT

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES THIS COURT'S ATTENTION

Petitioner rightly states that this Court has not previously been called on to construe Section 7 of the En-

[3] The District Court's opinion is set forth in Petitioner's Appendix B, at pages A. 34-46, and is officially reported at 400 F. Supp. 705.

dangered Species Act, and also correctly notes that the Fifth Circuit's opinion was the first appellate opinion relating to the Act. (Pet. Br. 11). This opinion was a straightforward interpretation of Section 7, and palpably correct. The evidence of a statutory violation of the clear and unequivocal mandate of Section 7—to *insure* that Federal actions do not further jeopardize an endangered species or destroy or modify the critical habitat for such a species—was monumental. The District Court's finding to the contrary was plainly erroneous. The Court of Appeals had no option but to reverse, which of course it did.

The petitioner claims that the Fifth Circuit erred in "granting the Secretary of the Interior *absolute authority* to determine what actions must be taken by the Department of Transportation to fulfill its duties and responsibilities pursuant to Section 7". (Pet. Br. 20). (*Emphasis ours*).

The Court of Appeals acknowledged that Interior did not have a "veto" over the highway. (A. 23). However, it also recognized that the Department has "primary jurisdiction" over the administration of the Endangered Species Act (A. 31), that "the subject matter * * * [was] within the specialized field of the Department" (A. 31) and that it necessarily has the expertise to determine what action needed to be taken to bring the proposed highway into harmony with the statute.[4] The Court recognized Interior's responsibility—"we defer to its determinations of what modifications are necessary" (A. 31)—to propose a final resolution to this controversy. In the context of this case, with its history of petitioner's recalcitrance and bad faith, the Fifth Circuit implicitly and quite properly placed on petitioner the burden of

[4] The Court also took note that Interior had previously, repeatedly and unavailingly protested the highway plan, particularly the interchange and the digging of the borrow pits. (A. 12-16).

challenging Interior's administrative findings (*i.e.*, should further court action be necessary, the burden of coming forward with evidence that those findings are wrong); as the Court (at A. 24) was careful to note, however, the burden of proving a statutory violation remains on the respondent.

In short, the opinion from which petitioner seeks relief was carefully reasoned, tailored to the record, correct, and as an initial judicial exposition of what Congress intended in the Endangered Species Act leaves little room for argument. It certainly raises no issue requiring this Court's further review and intervention.

II.

THERE IS NO CONFLICT BETWEEN THE FIRST AND EIGHTH CIRCUITS OVER CONSTRUCTION OF THE ENDANGERED SPECIES ACT

In *Sierra Club* v. *Froehlke*, 534 F. 2d. 1289 (1975) the Eighth Circuit affirmed a district court's finding of non-violation of Section 7. Plaintiff-appellant had challenged a Corps of Engineers dam which arguably threatened the cave habitat of some 30,000 Indiana Bats living in the Meramec River basin. That habitat had *not* been declared critical by the Department of the Interior. Some 700,000 Indiana Bats were still extant. The District Court was unpersuaded by the evidence either that bats on the Meramec would be destroyed or that, in any event, the existence of the species was threatened by this project. The Court of Appeals was unable to find "clear error". *Sierra Club* v. *Froehlke*, 534 F. 2d. at 1305. While the Department of Interior had not "acquiesced" to the building of the dam, the Eighth Circuit properly noted (at p. 1303) that its "acquiescence" was not required by Section 7.

Both the Fifth and Eighth Circuits have *explicitly* recognized that Interior holds no veto power over projects sponsored or financed by sister federal agencies. (*See* A. 23). The Fifth Circuit has, in addition, acknowledged that because of Interior's "primary responsibility for implementing Section 7" (A. 23), and where a statutory violation has been established, courts can—and, in cases such as this one, should—look to Interior's expertise in deciding what project modifications need be made to avoid a collision with the Endangered Species Act.

The decisions of the Fifth and Eighth Circuits are complementary to one another, not in conflict, and the purported need to resolve an inconsistency is illusory.

CONCLUSION

For the reasons stated, the petition by the Mississippi State Highway Department for a Writ of Certiorari should be denied.

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